IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
ROBERT SMITH,
Respondent.

CASE NO. 81,534

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Robert Smith, was the defendant in the trial court and the Appellant in the district court of appeal. He will be referred to by name or as Respondent in this brief. Petitioner was the prosecution in the trial court and the Appellee in the district court.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions and clarifications:

1. The driver (Flowers) was doing "something" to his face at the time he was not maintaining a single lane. Deputy Brandes believed he was either intoxicated or extremely sleepy (R 14).

2. Although Brandes followed the vehicle for a mile before he completed the traffic stop (R 13), the only erratic driving Brandes observed was the initial swerving when the car passed the patrol vehicle and he saw the driver's hands in his face. There was no further erratic (R 14).

3. Brandes had a video camera in his car that recorded the events as they occurred. The video tape began operating when he started northbound after the vehicle (R 14); there was no erratic driving shown in the video. Brandes does not believe Flowers was speeding (R 15).

4. Brandes did not give Flowers roadside sobriety tests (R 18).

5. When Deputy Hart opened the glove compartment during the search of Flowers' vehicle, the paper towel was not laying right there. You had to know what you were actually looking for to find it (R 30-31).

6. The package was hidden up and to the left behind the glove box, actually stuck up behind the dashboard and the air conditioning duct (R 31). They had to drop the glove compartment down to remove the package (R 11).

7. When Flowers and Respondent were placed in the patrol vehicle they had not committed any crime and they were not in the process of committing any crime to Brandes' knowledge. They were not under arrest for anything at the time they were placed in the back seat of his patrol car. Although Brandes had "hunches" at that time, Flowers and Respondent were not under investigation (R 19-21).

8. Petitioner moved for rehearing en banc and for a stay of mandate pending review on March 31, 1993. On April 9, 1993, before Respondent's 10 days to respond to said motions had elapsed, the fourth district granted Petitioner's motion for stay of mandate and certified a question to this Court. Respondent had timely filed his motion to strike Petitioner's motion for rehearing en banc and a response to motion to stay mandate before receiving the district court's order of April 9, 1993. Thereafter Respondent filed an emergency motion to reconsider the court's order of April 9, 1993 on April 12, 1993. On April 30, 1993, the fourth district denied Petitioner's motion for rehearing en banc, denied Respondent's motion to strike Petitioner's motion for rehearing en banc, and granted Respondent's emergency motion to reconsider the April 9, 1993 order but let the order of April 9, 1993 stand.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise jurisdiction over this case. A unanimous Fourth District Court of Appeal reversed a circuit court order denying Respondent's motion to suppress a secretly tape-recorded conversation. In doing so, the district court applied existing law to the instant facts. It concluded that Respondent had a subjective and reasonable expectation of privacy in his oral communications in the rear seat of a patrol vehicle because he was not under arrest and law enforcement did not have a founded suspicion that he was engaged in illegal activity. This opinion, based upon sound and long-standing legal principles, does not require review by this Court. The district court of appeal properly held that the secret and unauthorized tape recordings constituted an invasion of Respondent's right to privacy and a violation of Section 934.03, Florida Statutes (1991), and thus are inadmissible under Section 934.06, Florida Statutes (1991). Additionally, the government has failed to establish that a compelling state interest justified the unlawful intrusion on Respondent's state constitutional right to privacy.

ARGUMENT

POINT I (RENUMBERED)

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(B)(4) OF THE FLORIDA CONSTITUTION.

Respondent contends that this Court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, to decline to answer the question certified by the Fourth District Court of Appeal.

The question certified to this Court, "Would society conclude that the expectation of privacy, under the facts presented, was reasonable?" is not so unique or of such far reaching consequences as to necessitate resolution by this Court. Stein v. Darby, 134 So. 2d 232, 236-237 (Fla. 1961).

In Lake v. Lake, 103 So. 2d 639, 641-642 (Fla. 1958), this Court addressed the limits placed on its jurisdiction to prevent the intermediate appellate courts from "becoming way stations on the road to the Supreme Court." Though this Court was discussing a different aspect of review, the rationale behind the decision applies at bar:

> *They [district courts of appeal] are and were meant to be courts of final, appellate jurisdiction*. (emphasis in original) (citations omitted). If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court

> of appeal about the disposition of a given case.

Lake, 103 So. 2d at 642. Although the probe here may be with the consent of the district court and unquestionably within the power of this Court, it appears that increasing numbers of questions are being certified as being "of great public importance."[1] The review requested sub judice is nothing more than a second appeal.

Unless and until another district court addresses the same issue and resolves it differently, there is no showing that the issue here is of such statewide importance that only this Court should resolve it.

In light of the policy set forth in Lake, and for the reasons enunciated above, Respondent suggests that this Court decline to accept jurisdiction to review the instant decision of the Fourth District Court of Appeal.

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[1] The office of the Clerk of the Supreme Court reports that 88 questions were certified in 1988, 102 in 1989, 151 in 1990, 189 in 1991 and 156 in 1992.

POINT II

WOULD SOCIETY CONCLUDE THAT THE EXPECTATION OF PRIVACY, UNDER THE FACTS PRESENTED, WAS REASONABLE? (QUESTION CERTIFIED).

In the circuit court, Respondent unsuccessfully sought suppression of a tape recording and cocaine. After a traffic stop was concluded, Respondent and the driver, Flowers, were told that they were free to leave. However, Deputy Brandes then asked and received permission from Flowers to search the vehicle. Although they were not under arrest and law enforcement did not have a founded suspicion or probable cause to believe they were engaged in unlawful conduct, Respondent and Flowers were placed in the rear seat of a patrol vehicle for their comfort and safety. The vehicle was equipped with a secret tape recorder and a tape recording was made of Respondent's private conversation with Flowers in the vehicle. Although the tape recording did not lead to the discovery of the cocaine, the tape recording was the only evidence that linked Respondent to the concealed cocaine. The circuit court concluded that Respondent did not have a reasonable expectation of privacy because he was seated in a police car and denied the motion to suppress (R 42-44).

The Fourth District Court of Appeal disagreed in part. Citing a unanimous en banc decision of the fourth district in Springle v. State, 613 So. 2d 65 (Fla. 4th DCA 1993), review pending, No. 81,138, the district court found that the contents of the tape recording and any evidence derived therefrom are inadmissible under Section 934.06, Florida Statutes (1991), as the secret and

unauthorized tape recording constituted an invasion of the right to privacy and a violation of Section 934.03, Florida Statutes (1991). Smith v. State, 616 So. 2d 509 (Fla. 4th DCA 1993). Respondent had a reasonable expectation that his conversation was private under the circumstances presented in the instant case. The district court did not reverse the order denying the suppression of the cocaine as the tape recording did not lead to its discovery. Id. at 510. The district court subsequently certified the sole question of whether Respondent's expectation of privacy was reasonable under these circumstances.

Thus, the fourth district decided this case in reliance on Chapter 934, Florida Statutes (1991), and Article I, Section 23 of the Florida Constitution. Each of these provisions supply an independent state basis supportive of Respondent's position. Contrary to Petitioner's assertion, the Fourth Amendment is not implicated herein. The sole issue certified to this Court is "Would society conclude that the expectation of privacy, under the facts presented, was reasonable?" Respondent advocates an affirmative response as required by Chapter 934, Florida Statutes (1991), and Article I, Section 23 of the Florida Constitution.

However, assuming arguendo that this Court disagrees with this analysis, Respondent further contends that an affirmative answer is still required by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

First, and perhaps most importantly, the use of the instant tape recordings in any judicial proceeding is prohibited by Chapter

934, Florida Statutes, "Security of Communications." These statutory provisions require consideration separate and apart from Florida or federal constitutional analysis. Chapter 934 provides an independent state basis to approve the decision of the district court of appeal.

In Section 934.01(4), the Florida Legislature set forth its purpose in enacting Chapter 934:

> To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and the information obtained thereby is not misused.

This policy "applies to the privacy of all citizens, including those accused of crimes." Horn v. State, 298 So. 2d 194, 197 (Fla. 1st DCA 1974), cert. denied, 308 So. 2d 117 (Fla. 1975).

"Oral communication" is defined in Section 934.02(2), Florida Statutes, as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." Nonconsensual interception of oral communications is legitimate only if done in accordance with a court order. §§ 934.01(4), 934.02(2), Fla. Stat. As the Fourth District Court of Appeal noted in State v. Sells, 582 So. 2d 1244,

1245 (Fla. 4th DCA 1991):

> In enacting chapter 934, the legislature intended that each party to a private conversation should enjoy an expectation of privacy in that conversation. Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977). The statute is designed to protect the victims of illegal interceptions, not those who perpetrate them. State v. News-Press Pub. Co., 338 So. 2d 1313 (Fla. 2d DCA 1976). The statute bars the recordings of conversations without the consent of the other party. Shevin.

In State v. Inciarrano, 473 So. 2d 1272 (Fla. 1985), this Court expanded upon the definition of oral communication as set forth in the statute to require that society accept the expectation as reasonable. Thus, oral communication falls within the statutory scheme "if the person whose conversation or voice is being recorded expects that their conversation or voice will not be recorded and the circumstances justify that expectation and society is prepared to accept that expectation as reasonable." LaPorte v. State, 512 So. 2d 984, 986 (Fla. 2d DCA 1987); State v. Inciarrano, 473 So. 2d at 1275.

In Inciarrano, in which this Court answered what it characterized as an issue "narrowed by the particular factual situation involved," this Court addressed "the more narrow issue of whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934." Inciarrano, 473 So. 2d at 1273. Under these unique circumstances, this Court would not allow Section 934.06 to shield the perpetrator because society would not accept as reasonable the murderer's expectation that his communication would not be intercepted or

recorded where the victim tape recorded his own murder in his office. This Court limited this holding to the narrow issue it considered and this fact-specific scenario is decidedly not present in the instant circumstances.

Under Section 934.03, Florida Statutes, a crime occurs where a person, even law enforcement, willfully intercepts communications. Further, Section 934.06, Florida Statutes, precludes the use or derivative use of any illegally intercepted communication as evidence in any proceeding. State v. Calhoun, 479 So. 2d 241, 243-244 (Fla. 4th DCA 1985).

Without question, Respondent plainly believed that his conversation was private. Moreover, that belief was justified under the circumstances because it was deliberately fostered by law enforcement. See State v. Calhoun, 479 So. 2d at 243. Law enforcement assured Respondent and his co-defendant that they were not under arrest and were free to leave. Law enforcement directed Respondent to sit inside the cruiser not because he was being detained but for his own safety. Society should recognize as reasonable Respondent's expectation of privacy where law enforcement misrepresents the situation to persons who were the subject of "hunches," not reasonable founded suspicion. A citizen should be entitled to take law enforcement at its word; a citizen should not be required to anticipate such a ruse. As Judge Letts so ably wrote in Springle v. State:

> When the police offer succor and shelter to Florida citizens, neither under arrest nor even articulable suspicion, we believe that the democratic society in which we live would

> expect that its conversations not be secretly recorded by law enforcement.

Springle v. State, 613 So. 2d at 68.

As Respondent was neither under arrest nor detained pursuant to a founded suspicion of criminal activity, clearly he had a subjective expectation of privacy which society willingly accepts as reasonable. Indeed, in our society, our citizens would be expected to demand that such an expectation exist and that a person who is neither under arrest nor detained pursuant to a founded suspicion could expect to engage in a private conversation, albeit in a patrol car, without law enforcement secretly tape recording his conversation.

Thus, the district court correctly concluded that the tape should have been excluded pursuant to Section 934.06, Florida Statutes, where law enforcement secretly tape recorded the conversation of Respondent, who was not under arrest or detained pursuant to a founded suspicion or probable cause.

In addition, Florida constitutional grounds under Article I, Section 23 provide an independent state basis for approving the well-reasoned decision of the Fourth District Court of Appeal.

Article I, Section 23 of the Florida Constitution guarantees to all Floridians the right to privacy -- "...the right to be let alone and free from governmental intrusion into his private life..." The right to privacy in Florida is independent of and greater than the general federal right embodied in the Fourteenth Amendment to the United States Constitution. In Re T.W., 551 So. 2d 1186 (Fla. 1989); Winfield v. Division of Pari-Mutuel Wagering,

477 So. 2d 544, 548 (Fla. 1985). Section 23 was intentionally couched in strong terms to afford the citizens of this state the utmost protection. In Re T. W., 551 So. 2d at 1191-1192; Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d at 548.

Both this Court and the United States Supreme Court recognize that it is primarily the responsibility of the state, and not the federal government, to protect the general right to privacy. Id.; Katz v. United States, 389 U.S. 347, 350-351, 88 S. Ct. 507, 511 (1967). Article I, Section 23 accomplishes this for Floridians. "This right ensures that individuals are able `to determine for themselves when, how and to what extent information about them is communicated to others.' (citation omitted)." Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989).

Thus, the Florida Constitution guarantees the right to "informational privacy." Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533, 536 (Fla. 1987). In Rasmussen, this Court recognized that "a principle aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life." Id. at 536.

Respondent submits that the surreptitious tape recording of a private conversation by governmental agents falls within the ambit of the amendment. By secretly recording Respondent's dialogue, the deputies were collecting information about Respondent which plainly was not intended for public knowledge.

Respondent contends that this issue is comparable to Shaktman

v. State, 529 So. 2d 711 (Fla. 3d DCA 1988), approved, 553 So. 2d 148 (Fla. 1989). The Third District Court of Appeal found Article I, Section 12 of the Florida Constitution is not implicated by the use of pen registers to gather information. 529 So. 2d at 715. Review, however, did not stop there. Rather, the third district held that the use of pen registers, an information-gathering technique, fell within the ambit of Article I, Section 23. Id. at 716. This Court approved that result:

> The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest.

Shaktman, 553 So. 2d at 150. This Court held that "telephone numbers an individual dials or otherwise transmits represent personal information which in most instances the individual has no intention of communicating to a third party". Id. at 151.

Likewise, at bar, Respondent had no intention of revealing his private conversation to third persons. Thus, Article I, Section 23 is clearly implicated under the facts sub judice.

Where the right to privacy guaranteed by the Florida Constitution is implicated, this Court has applied the "compelling state interest" test.

> This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. (citations omitted).

Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d at 547.

In Shaktman, this Court applied this two-pronged test and found that this "strong standard of review" had been met. "[A] legitimate, ongoing investigation satisfies the compelling state interest test when it demonstrates a clear connection between the illegal activity and the person whose privacy would be invaded." Shaktman, 553 So. 2d at 152. Thus, the state was required to show (1) that there was a founded suspicion that the particular telephone was used in criminal activity and (2) it used the least intrusive means. The second prong of the test was satisfied where government obtained a valid court order based upon a founded suspicion which authorized the pen register. Id.

Neither prong of the test can be met sub judice. First, the deputies were not engaged in an ongoing investigation of Respondent. To the contrary, the car in which Respondent was a passenger was originally stopped for failure to drive within a single lane and a warning issued. Flowers (the driver) was asked for and gave permission to the deputies to conduct a search of the vehicle. The state has never argued that the deputies had a founded suspicion that Respondent was engaged in criminal activity and the circuit court specifically found that none existed (R 42-44). Thus, the instant scenario does not involve an ongoing investigation. As to the second prong, the deputies made no attempt to obtain a court order to secretly tape record Respondent's conversation. Unlike a pen register which provides merely telephone numbers, the deputies at bar were able to actually eavesdrop on the conversation without

a founded suspicion that the conversants had committed any wrongdoing and without prior judicial authorization. Hardly the least intrusive means.

Under the circumstances at bar, in marked contrast to those in Shaktman, the compelling state interest standard of review is not met. As the compelling state interest test is not satisfied, Respondent submits that his private conversation was tape recorded in derogation of the right to privacy encompassed in Article I, Section 23 of the Florida Constitution.

Finally, assuming arguendo that this Court is persuaded by Petitioner that the Fourth Amendment is also implicated herein, Respondent asserts that Fourth Amendment analysis is also supportive of the result reached by the district court.

Petitioner contends that Article I, Section 23 does not apply at bar because the instant cause is governed by the Fourth Amendment (Petitioner's Brief at 17). Petitioner, however, also argues that the instant communication is outside of the Fourth Amendment because it does not involve a reasonable expectation of privacy. Petitioner cannot have it both ways.

The Fourth and Fourteenth Amendments to the United States Constitution protect citizens from unreasonable searches and seizures. To a certain extent, the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion." Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 510 (1967). Article I, Section 12 of the Florida Constitution requires this Court to construe search and seizure issues in

conformity with opinions of the United States Supreme Court.

The United States Supreme Court has recognized the significant intrusion on personal privacy caused by eavesdropping. "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." Berger v. New York, 388 U.S. 41, 63, 87 S. Ct. 1873, 1185 (1967) (New York's "permissive eavesdrop statute" violated Fourth Amendment because it authorized indiscriminate use of electronic eavesdropping devices, without a sufficient showing of probable cause).

Later, in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, the United States Supreme Court, in deciding whether a citizen's conversation in a public telephone booth was constitutionally protected from unwarranted governmental interception, defined the right to privacy protected by the Fourth Amendment. The Court wrote:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (citation omitted). But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (citation omitted).

389 U.S. at 351-352, 88 S.Ct. at 511 (emphasis supplied).

In both opinions, the Court emphasized that compliance with traditional warrant requirements is mandatory for lawful governmental interception of private communication. Only by presenting evidence sufficient to establish probable cause, stating with particularity the persons and communications sought to be intercepted to a neutral magistrate, can law enforcement obtain a

warrant to intercept communication which will pass constitutional muster. The safeguards are required to ensure that governmental intrusion into our private lives is minimal. Berger v. New York, 388 U.S. at 54-60, 87 S. Ct. at 1881-1884; Katz v. United States, 389 U. S. at 354-359, 88 S. Ct. at 513-515.

Whether or not the Fourth Amendment is implicated depends upon whether an individual has a "`justifiable,' a `reasonable' or a `legitimate expectation of privacy' that has been invaded by government." Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979). A subjective expectation of privacy coupled with society's willingness to accept it as reasonable is afforded Fourth Amendment protection. Hudson v. Palmer, 468 U.S. 517, 525 n. 7, 104 S. Ct. 3194, 3199 n. 7, 82 L. Ed. 2d 393 (1984).

A body of law developed in state court which held that an inmate's communications in jail or a detainee's communication in a police station may be monitored by correctional personnel or law enforcement because the inmate/detainee does not have a reasonable expectation of privacy when housed in such a locale. Brown v. State, 349 So. 2d 1196 (Fla. 4th DCA 1977). Brown extended this rule of law to an arrested person confined in a police vehicle. The Fourth District reasoned that "[O]nce a person is taken into custody by law enforcement authorities, his right to privacy has been effectively diminished, and he has no reasonable expectation that his conversations will be private." Id.

This underlying consideration was amplified by the United States Supreme Court in Hudson v. Palmer, 468 U.S. 517, 104 S. Ct.

3194, which held that an inmate in a state correctional institution does not have a reasonable expectation of privacy in his prison cell and approved random cell searches by prison officials without probable cause or founded suspicion. The United States Supreme Court addressed the issue as follows:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.
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> * * *
>
> Determining whether an expectation of privacy is "legitimate" or "reasonable" necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." (citation omitted). We strike the balance in favor of institutional security, which we have noted is "central to all other corrections goals" (citation omitted). A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. (footnote omitted). We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that

> "[l]oss of freedom of choice and privacy are inherent incidents of confinement" (citation omitted.

468 U.S. at 525-528; 104 S. Ct. 3200-3201.

In accordance with these principles, in each state case holding that a defendant does not have a right to privacy in a custodial setting, the defendant is under arrest and the legality of his status is unquestioned. Brown v. State, 349 So. 2d 1196 (defendant arrested for robbery); DiGuilio v. State, 451 So. 2d 487, 490 (Fla. 5th DCA 1984), approved on other grounds, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (after arrest for narcotics); Stanley v. State, 350 So. 2d 475 (Fla. 4th DCA 1977), approved, Stanley v. Wainwright, 604 F.2d 379 (5th Cir. 1979) (defendant arrested for robbery); State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990) (defendants arrested as result of undercover narcotics investigation). See generally, Annotation, *Admissibility, in Criminal Prosecution, of Evidence Obtained by Electronic Surveillance of Prisoner,* 57 A.L.R.3d 172 (1974). Therefore, it was the status of the defendants that caused the courts to determine that each defendant did not have a reasonable expectation of privacy under these circumstances, not the area in which the defendant was located.

By contrast, where an individual is not under arrest nor detained pursuant to a founded suspicion, he should maintain a reasonable expectation of privacy in his communications despite the location where they occur. The reason being that his constitutional right to privacy is not outweighed and, thus, not diminished by law

enforcement's right to constantly surveil his activities including listening to his conversations. Cf. Brown v. State, 349 So. 2d at 1196; Hudson v. Palmer, 468 U.S. at 527-528; 104 S. Ct. at 3200-3201.

Petitioner asks this Court to enlarge the state court holdings and create a bright line rule that one can never have a reasonable expectation of privacy when one is in a police car regardless of the circumstances that placed him there[2] (Petitioner's Brief at 10). However, the instant cause does not involve any of the policy considerations upon which Hudson was premised. Absent such overriding societal objectives as interest in the security of institutions housing convicted prisoners, one can not abandon traditional Fourth Amendment analysis and the holding of Katz: the existence of the right to privacy does not depend upon the place where the communication occurs, for the Fourth Amendment protects people, not places.

Thus, for instance, a person may have a clear expectation of privacy even though he is in a jailhouse where the expectation is

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[2] The only case which reaches this result is United States v. McKinnon, 7 Fla. L. Weekly Fed. C90 (11th Cir. March 9, 1993), where the Federal Circuit Court found that a defendant did not have either a subjective or a reasonable expectation of privacy. The McKinnon court, however, did not engage in the balancing test required for Fourth Amendment analysis as discussed in Hudson v. Palmer, 468 U.S. at 527, 104 S.Ct at 3200. Rather, in conclusory language, it rejected the defendant's argument that he had a reasonable expectation of privacy although his communication occurred in a police car, primarily in reliance on the holdings cited herein where state courts had found that an inmate/detainee did not have a reasonable expectation of privacy. Thus, Respondent suggests it was wrongly decided and should not be followed by this Court.

"deliberately fostered by police officers." State v. Calhoun, 479 So. 2d at 243.[3] As Chief Justice Barkett wrote:

> It is the private conversation that is protected! The fact that the conversation took place in an interview room of the Detective Bureau does not diminish that protection.

Id. at 244.

Additionally, to hold as Petitioner suggests would undermine Fifth and Sixth Amendment guarantees upon which Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), issued. It would circumvent the warrant requirement emphasized in Katz v. United States, 389 U.S. at 354-359, 88 S.Ct. at 513-515, and Berger v. New York, 388 U.S. at 54-60, 87 S. Ct. at 1881-1884. By engaging in deliberate misrepresentation and purposeful deception, law enforcement, acting only on hunches, could place a defendant in the back seat of a police car for the purpose of eliciting incriminating information. Law enforcement could obtain this evidence without ever advising a defendant of his constitutional rights. Thus, such a rule accomplishes by ruse what the constitution prohibits. Cf. State v. Calhoun, 479 So. 2d at 243.

Application of the law to the instant scenario makes it apparent that Respondent had a reasonable expectation that his conversation, albeit in a patrol car, was private. He was not under

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[3] Contrary to the implication in Petitioner's brief at page 13, this analysis does not create a constitutional right where none exists. Rather, the right to privacy exists whenever a person holds a subjective expectation of privacy which society is willing to accept as reasonable. As the Katz decision made clear, this determination is not dependent upon place alone. Rather, all the circumstances must be considered in determining whether society is willing to accept the expectation as reasonable.

arrest for any offense, nor did law enforcement have probable cause or a founded suspicion to detain him. He was not even the subject of an investigation (R 19-21). Purportedly, he was free to leave (R 7). Respondent and Flowers were on the scene because Flowers agreed to a search of the vehicle. Thus, neither man was in police custody.

As Respondent was not under arrest, unlike the defendants in Brown, DiGuilio, Stanley and McAdams, Respondent's expectation of privacy was not diminished by law enforcement's right to surveil him. Respondent had a reasonable expectation of privacy sufficient to invoke Fourth Amendment protection. See Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431 (1960) (defendants in taxi cab).

Moreover, Respondent's expectation of privacy was even fostered by law enforcement. Brandes told Respondent and Flowers and led them to believe that they were free to leave. They were not under arrest or confined. They had no reason to believe that they were being monitored as suspects. Deputy Brandes created the impression and testified that his vehicle was not meant as a custodial setting, but as a place of safekeeping and comfort (R 8-10). Such a ruse cannot withstand constitutional attack. Art. I, §12, Fla. Const.; Amend. IV, XIV, U.S.Const.; State v. Calhoun, 479 So. 2d at 245.

Because the tape-recorded conversation of Respondent was also obtained in contravention of his right to be free from unreasonable search and seizure guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section

12 of the Florida Constitution, it is inadmissible as evidence. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Therefore, under Florida statutory analysis, Florida constitutional analysis, or federal constitutional analysis, the certified question at bar should be answered in the affirmative and the instant decision of the Fourth District Court of Appeal, following the unanimous en banc decision of the district court in Springle, should be upheld.

CONCLUSION

Should this Court exercise its jurisdiction over this cause, Respondent requests that this Court answer the certified question in the affirmative and approve the decision of the Fourth District Court of Appeal in Smith v. State.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, to Carol Cobourn Asbury, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299, this 21st day of JULY, 1993.

Susan D Cline

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